

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JOE E. SHARP,	)	
	)	No. CV-07-3037-CI
Plaintiff,	)	
	)	ORDER GRANTING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND REMANDING FOR ADDITIONAL
MICHAEL J. ASTRUE,	)	PROCEEDINGS PURSUANT TO
Commissioner of Social	)	SENTENCE FOUR 42 U.S.C. §
Security,	)	405(g)
	)	
Defendant.	)	
	)	
	)	

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BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 23, 26.) Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney David M. Blume represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 9.) On March 21, 2008, Plaintiff filed a reply. (Ct. Rec. 28). After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings.

**JURISDICTION**

On August 29, 2003, and September 2, 2003. Plaintiff Joe Sharp

1 (Plaintiff) protectively filed for supplemental security income  
2 benefits (SSI) and disability insurance benefits (DIB). (Tr. 53-55,  
3 421-424.) Upon initial application, Plaintiff alleged disability  
4 due to degenerative joint disease, back pain, depression and post-  
5 traumatic stress disorder, with an alleged onset date of October 1,  
6 1996. (Tr. 53, 74.) Benefits were denied initially and on  
7 reconsideration. (Tr. 28-30, 33-34, 426-430, 432-434.) Plaintiff  
8 requested a hearing before an administrative law judge (ALJ), which  
9 was held before ALJ Riley J. Atkins on September 21, 2006. (Tr.  
10 441-477.) Plaintiff, who was present and represented by counsel,  
11 and vocational expert Kay Wise, testified. The ALJ denied benefits  
12 and the Appeals Council denied review. (Tr. 6-8.) The instant  
13 matter is before this court pursuant to 42 U.S.C. § 405(g).

#### 14 **STATEMENT OF THE CASE**

15 The facts of the case are set forth in detail in the transcript  
16 of proceedings, and are briefly summarized here. Plaintiff was 36  
17 years old at onset and 46 at the time of the decision. (Tr. 21,  
18 23.) He has approximately a tenth-grade education. (Tr. 312, 443.)  
19 He testified he had past work experience as a house painter. (Tr.  
20 468.) Plaintiff testified that he has not consumed alcohol or non-  
21 prescribed drugs for about three years. (Tr. 449.)

#### 22 **ADMINISTRATIVE DECISION**

23 ALJ Atkins found Plaintiff met the insured status requirements  
24 for DIB through June 30, 2000. (Tr. 13, 15.) At step one of the  
25 sequential evaluation, the ALJ found Plaintiff had not engaged in  
26 substantial gainful activity since the onset date of October 1,  
27 1996. (Tr. 15.) At steps two and three, he found Plaintiff  
28

1 suffered from the severe impairments of degenerative disc disease  
2 with mild spondylosis and a history of scoliosis, dysthymic  
3 disorder, antisocial personality disorder, and polysubstance  
4 dependence in sustained full remission (Tr. 15), but these  
5 impairments alone or in combination did not meet or equal one of the  
6 listed impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations  
7 No. 4 (Listings). (Tr. 16.) ALJ Atkins found Plaintiff not fully  
8 credible. (Tr. 18-21.) At step four, he determined Plaintiff had  
9 the following residual functional capacity (RFC) to perform a range  
10 of medium work:

11 [The claimant] is able to lift and/or carry 50 pounds  
12 pounds occasionally and 25 pounds frequently. He is able  
13 to stand and/or walk 6 hours during a fulltime 8-hour  
14 workday. He is able to sit 6 hours during a fulltime 8-  
hour workday. He is able to understand and perform  
simple, routine and repetitive work involving little  
contact with the general public.

15 (Tr. 17.)

16 At step four, based on vocational expert testimony, the ALJ  
17 determined Plaintiff could not perform his past relevant work as a  
18 house painter. (Tr. 21.) At step five, the ALJ again relied on the  
19 VE's testimony and determined that there are other jobs Plaintiff  
20 can perform. (Tr. 22.) Therefore, Plaintiff was not found  
21 "disabled" as defined in the Social Security Act at any time through  
22 the date of the ALJ decision. (Tr. 23.)

#### 23 STANDARD OF REVIEW

24 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
25 court set out the standard of review:

26 A district court's order upholding the Commissioner's  
27 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
211 F.3d 1172, 1174 (9<sup>th</sup> Cir. 2000). The decision of the  
28 Commissioner may be reversed only if it is not supported

by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, although deference is owed to a reasonable construction of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000).

#### SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made.

1 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
2 claimant bears the burden of proving that [s]he is  
3 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
4 1999). This requires the presentation of "complete and  
detailed objective medical reports of h[is] condition from  
licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
404.1512(a)-(b), 404.1513(d)).

5 It is the role of the trier of fact, not this court, to resolve  
6 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
7 supports more than one rational interpretation, the court may not  
8 substitute its judgment for that of the Commissioner. *Tackett*, 180  
9 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
10 If there is substantial evidence to support the administrative  
11 findings, or if there is conflicting evidence that will support a  
12 finding of either disability or non-disability, the finding of the  
13 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
14 1230 (9<sup>th</sup> Cir. 1987). Nevertheless, a decision supported by  
15 substantial evidence will still be set aside if the proper legal  
16 standards were not applied in weighing the evidence and making the  
17 decision. *Browner v. Secretary of Health and Human Services*, 839  
18 F.2d 432, 433 (9<sup>th</sup> Cir. 1988).

19 Plaintiff has the burden of showing that drug and alcohol  
20 addiction (DAA) is not a contributing material factor to disability.  
21 *Ball v. Massanari*, 254 F.3d 817, 823 (9<sup>th</sup> Cir. 2001). The Social  
22 Security Act bars payment of benefits when drug addiction and/or  
23 alcoholism is a contributing factor material to a disability claim.  
24 42 U.S.C. §§ 423(d)(2)(C) and 1382(a)(3)(J); *Sousa v. Callahan*, 143  
25 F.3d 1240, 1245 (9<sup>th</sup> Cir. 1998). If there is evidence of DAA and the  
26 individual succeeds in proving disability, the Commissioner must  
27 determine whether the DAA is material to the determination of  
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1 disability. 20 C.F.R. §§ 404.1535 and 416.935. If an ALJ finds  
2 that the claimant is not disabled, then the claimant is not entitled  
3 to benefits and there is no need to proceed with the analysis to  
4 determine whether alcoholism or drug abuse is a contributing factor  
5 material to disability. However, if the ALJ finds that the claimant  
6 is disabled and there is medical evidence of drug addiction or  
7 alcoholism, then the ALJ must proceed to determine if the claimant  
8 would be disabled if he or she stopped using alcohol or drugs.  
9 *Bustamante v. Massanari*, 262 F.3d 949 (9<sup>th</sup> Cir. 2001).

#### 10 ISSUES

11 The question is whether the ALJ's decision is supported by  
12 substantial evidence and free of legal error. Specifically,  
13 Plaintiff assigns error to the ALJ's evaluation of the medical  
14 evidence.

#### 15 DISCUSSION

##### 16 A. Weighing Medical Evidence

17 Plaintiff alleges that the ALJ erred by failing to properly  
18 weigh the opinion of treating physician Judy Richardson, M.D. (Ct.  
19 Rec. 24 at 15-20.) The Commissioner responds that the ALJ's  
20 determinations should be affirmed because they are based on  
21 substantial evidence and free of legal error. (Ct. Rec. 27 at 6-  
22 11).

23 In social security proceedings, the claimant must prove the  
24 existence of a physical or mental impairment by providing medical  
25 evidence consisting of signs, symptoms, and laboratory findings; the  
26 claimant's own statement of symptoms alone will not suffice. 20  
27 C.F.R. § 416.908. The effects of all symptoms must be evaluated on  
28

1 the basis of a medically determinable impairment which can be shown  
2 to be the cause of the symptoms. 20 C.F.R. § 4416.929. Once  
3 medical evidence of an underlying impairment has been shown, medical  
4 findings are not required to support the alleged severity of the  
5 symptoms. *Bunnell v. Sullivan*, 947 F. 2d 341, 345 (9<sup>th</sup> Cir. 1991).

6 A treating or examining physician's opinion is given more  
7 weight than that of a non-examining physician. *Benecke v. Barnhart*,  
8 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining  
9 physician's are not contradicted, they can be rejected only with  
10 "clear and convincing" reasons. *Lester v. Chater*, 81 F.3d 821, 830  
11 (9<sup>th</sup> Cir. 1996). If contradicted, the ALJ may reject an opinion if  
12 he states specific, legitimate reasons that are supported by  
13 substantial evidence. See *Flaten v. Secretary of Health and Human*  
14 *Serv.*, 44 F.3d 1453, 1463 (9<sup>th</sup> Cir. 1995). In addition to medical  
15 reports in the record, the analysis and opinion of a non-examining  
16 medical expert selected by the ALJ may be helpful to the  
17 adjudication. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9<sup>th</sup> Cir. 1995)  
18 (citing *Magallanes v. Bowen*, 881 F.2d 747, 753 (9<sup>th</sup> Cir. 1989)).  
19 Testimony of a medical expert may serve as substantial evidence when  
20 supported by other evidence in the record. *Id.*

21 Physical impairments

22 Plaintiff alleges the ALJ erred by failing to discuss the  
23 opinion of treating physician Judy Richardson, M.D., in September of  
24 2002. Dr. Richardson restricted Plaintiff to sedentary work due to  
25 low back strain. (Ct. Rec. 24 at 17-19, referring to Tr. 168-169.)  
26 The Commissioner acknowledges that the ALJ did not discuss Dr.  
27 Richardson's opinion, but essentially argues that any error is

1 harmless because other substantial evidence supports the ALJ's  
2 assessed RFC. The other substantial evidence is the ALJ's rejection  
3 of an examining physician's RFC for light work, an RFC for medium  
4 work assessed by agency physicians (consistent with the RFC assessed  
5 by ALJ Riley), and Plaintiff's "extensive daily activities." (Ct.  
6 Rec. 27 at 7-8.)

7 On September 10, 2002, Dr. Richardson examined Plaintiff and  
8 assessed chronic low back pain. She was unable to rule out  
9 discogenic or degenerative disease pending x-ray results.<sup>1</sup> (Tr.  
10 167.) The parties acknowledge Dr. Richardson limited Plaintiff to  
11 no more than sedentary work. Later records show Dr. Richardson  
12 treated Plaintiff for acute muscle spasm on June 18, 2003,  
13 apparently triggered by Plaintiff moving rocks on his property.  
14 (Tr. 286.)

15 The Commissioner concedes that the ALJ fails to discuss Dr.  
16 Richardson's opinion. "[W]here the treating doctor's opinion is not  
17 contradicted by another doctor, it may be rejected only for 'clear  
18 and convincing' reasons." *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup>  
19 Cir. 1995)(citing *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9<sup>th</sup> Cir.  
20 1991). Even if the treating doctor's opinion is contradicted by  
21 another doctor, the Commissioner may not reject this opinion without  
22 providing "specific and legitimate reasons" supported by substantial

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24 <sup>1</sup>On September 10, 2002, disc space narrowing at L5-S1 with  
25 moderate surrounding bony spur formation was noted. (Tr. 333.) On  
26 September 19, 2003, x-rays showed marked narrowing of the L5-S1 disc  
27 space. (Tr. 282.) On September 26, 2003, moderate degenerative  
28 disc disease at C5-C6 is noted. (Tr. 278.)



1 evidence in the record for so doing. *Id.*, citing *Murray v. Heckler*,  
2 722 F.2d 499, 502 (9<sup>th</sup> Cir. 1983). The ALJ's failure to give at  
3 least specific and legitimate reasons supported by substantial  
4 evidence for rejecting treating Dr. Richardson's opinion is  
5 reversible error.

6 Even if the reasons offered by the Commissioner on appeal are  
7 deemed specific and legitimate, the court cannot affirm the decision  
8 of an agency on a ground not invoked by the agency in making its  
9 decision. *Pinto v. Massanari*, 249 F. 3d 840, 847-848 (9<sup>th</sup> Cir.  
10 2001), citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

11 The court notes that Dr. Richardson was not alone in limiting  
12 Plaintiff to sedentary work based on his spinal problems. On  
13 February 27, 2003, David Tuning, PAC, also opined that Plaintiff  
14 could perform no more than sedentary work. (Tr. 293.) Mr. Tuning  
15 observed that although Plaintiff's ROM studies "are pretty good,"  
16 they are "not sustainable without exacerbation of back pain." (*Id.*)  
17 The ALJ does not address this opinion.

#### 18 Mental impairments

19 Plaintiff alleges that the ALJ failed to properly weigh  
20 evidence of psychological impairment from "various treating mental  
21 health professionals," including assessments of marked limitations  
22 in five areas of functioning, and of moderate impairment in the  
23 ability to take care of self, including personal hygiene and  
24 appearance. (Ct. Rec. 24 at 19.) The Commissioner responds that  
25 the ALJ found these opinions unsupported and based on Plaintiff's  
26 discredited subjective complaints. (Ct. Rec. 27 at 10.) The  
27 Commissioner cites *Bayliss v. Barnhart*, 427 F.3d 1211, 1216-1217 (9<sup>th</sup>

1 Cir. 2005), and *Morgan v. Commissioner of Social Security Admin.*,  
2 169 F.3d 595, 601-602 (9<sup>th</sup> Cir. 1999), as supporting the  
3 Commissioner's reasoning.

4 Several mental health and medical providers describe  
5 Plaintiff's mental health impairments. On September 11, 2002,  
6 Plaintiff's therapist Rebecca Twohy, MSW, assessed personality  
7 disorder NOS, with dependent and antisocial features, and depressive  
8 disorder NOS. (Tr. 329.) She assessed several marked and moderate  
9 limitations, noted Plaintiff "makes impulsive decisions not always  
10 in his best interest," and opined that Plaintiff's history of  
11 substance abuse and institutionalization make it difficult to  
12 predict Plaintiff's ability to change. (Tr. 329-331.) On October  
13 29, 2002, Daniel Ferber, M.D., evaluated and began treating  
14 Plaintiff. (Tr. 200.) Dr. Ferber observed Plaintiff was poorly  
15 groomed and dressed. His affect was somewhat constricted and  
16 appeared dysphoric but not overtly depressed. (Tr. 201.) Dr. Ferber  
17 diagnosed dysthymia, early onset, moderate; polysubstance dependency  
18 in sustained full remission; conduct disorder, adolescent onset by  
19 history; and antisocial personality disorder. Dr. Ferber assessed  
20 a current GAF of 55<sup>2</sup> and began Plaintiff on medications. (Tr. 202.)  
21 Contrary to the DSM, the ALJ opined that an assessed GAF of 50 in  
22 October of 2002 "suggests the claimant's mental impairments result

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23  
24 <sup>2</sup>A GAF of 55 indicates moderate symptoms (e.g., flat affect and  
25 circumstantial speech, occasional panic attacks) or moderate  
26 difficulty in social, occupational, or school functioning (e.g., few  
27 friends, conflicts with peers and co-workers). DIAGNOSTIC AND  
28 STATISTICAL MANUAL OF MENTAL DISORDERS, 4th Ed., (DSM-IV), at 32.

1 in at most, moderate limitations." (Tr. 20.)

2 In March of 2003, Martha Usatine, MSW, evaluated Plaintiff.  
3 She opined Plaintiff's hygiene, grooming and judgment were poor; in  
4 six areas of functioning, Plaintiff is moderately impaired, and in  
5 one area (physical complaints), markedly impaired. (Tr. 187-191.)

6 On August 16, 2003, Trula Thompson, M.D., evaluated Plaintiff  
7 overall as chronically mentally ill. (Tr. 181.) Dr. Thompson noted  
8 diagnoses of DDD, dysthymic disorder, and personality disorder NOS  
9 with dependent and antisocial features. She recommended 1-2 years  
10 of treatment. (*Id.*) On April 7, 2004, Shirley Roffe, M.D., pointed  
11 out that Dr. Faber last saw Plaintiff on March 10, 2003. Plaintiff  
12 admitted he had not been taking his prescribed psychotropic  
13 medication. He admitted relapsing into alcohol use around Christmas  
14 or New Year's but had been clean and sober for 3 months. Dr. Roffe  
15 observed Plaintiff was poorly groomed, his affect was serious with  
16 a very narrow range, and speech was monotone and flat. Plaintiff  
17 denied depression but reported being quite stressed. (Tr. 178-  
18 179.) When Dr. Roffe saw Plaintiff again two months later, on June  
19 29, 2004, she observed that he was fairly poorly groomed and  
20 exhibited a serious affect with a narrow range. (Tr. 240.) On  
21 August 21, 2006, Steven Woolpert, M.S., M.H.P., assessed Plaintiff  
22 as seriously disturbed, moderately impaired in nine areas, and  
23 markedly impaired in two areas. (Tr. 415-417.)

24 The ALJ's rejection of the opinions of the examining and  
25 treating professionals as "unsupported" and based on Plaintiff's  
26 discounted subjective complaints, is itself not supported by the  
27 record. Additionally, while the ALJ found Plaintiff's "mental

1 impairments result in only mild restriction of activities of daily  
2 living, moderate difficulties in maintaining social functioning, and  
3 moderate difficulties with concentration, persistence or pace," the  
4 ALJ did not include the assessed moderate limitations in his  
5 hypothetical questions to the VE. (Cf. Tr. 17 with Tr. 469-471.)

6 **B. Remedy**

7 There are two remedies where the ALJ fails to give adequate  
8 reasons for rejecting the opinion of a treating or examining doctor.  
9 The general rule, found in the *Lester* line of cases, is that "we  
10 credit that opinion as a matter of law." *Lester*, 81 F.3d at 834;  
11 *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9<sup>th</sup> Cir. 1990); *Hammock v.*  
12 *Bowen*, 879 F.2d 498, 502 (9<sup>th</sup> Cir. 1989). Under the alternate  
13 approach found in *McAllister v. Sullivan*, 888 F.2d 599 (9<sup>th</sup> Cir.  
14 1989), a court may remand to allow the ALJ to provide the requisite  
15 specific and legitimate reasons for disregarding the opinion. See  
16 also *Benecke*, 379 F.3d at 594 (court has flexibility in crediting  
17 testimony if substantial questions remain as to claimant's  
18 credibility and other issues). Where evidence has been identified  
19 that may be a basis for findings, but the findings are not  
20 articulated, remand is the proper disposition. *Salvador v.*  
21 *Sullivan*, 917 F.2d 13, 15 (9<sup>th</sup> Cir. 1990) (citing *McAllister*);  
22 *Gonzales v. Sullivan*, 914 F.2d 1197, 1202 (9<sup>th</sup> Cir. 1990). Having  
23 reviewed the record and the ALJ's conclusions, this court finds that  
24 the ALJ: 1) did not properly weigh the treating and examining  
25 professionals' opinions, and 2) found that Plaintiff suffered from  
26 moderate mental impairments but did not include them in the RFC  
27 given to the VE.

1 The court expresses no opinion as to what the ultimate outcome  
2 on remand will or should be. On remand, the ALJ will conduct a new  
3 sequential evaluation, stating the reasons for the weight given to  
4 the opinions of treating and examining medical and mental health  
5 providers, and, if appropriate, include all determinable severe  
6 impairments in hypothetical questions to the VE. Given Plaintiff's  
7 documented history of substance abuse, if Plaintiff is found  
8 disabled, the ALJ must conduct an analysis pursuant to *Bustamante v.*  
9 *Massanari*, 272 F.3d 949 (9<sup>th</sup> Cir. 2001) to determine the effects of  
10 substance abuse. Accordingly,

11 **IT IS ORDERED:**

12 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 23**) is  
13 **GRANTED**. The matter is remanded to the Commissioner for additional  
14 proceedings pursuant to sentence four 42 U.S.C. 405(g).

15 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 26**) is  
16 **DENIED**.

17 3. An application for attorney fees may be filed by separate  
18 motion.

19 The District Court Executive is directed to file this Order and  
20 provide a copy to counsel for Plaintiff and Defendant. Judgment  
21 shall be entered for Plaintiff and the file shall be **CLOSED**.

22 DATED July 22, 2008.

23  
24 S/ CYNTHIA IMBROGNO  
25 UNITED STATES MAGISTRATE JUDGE  
26  
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